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25 **IN THE UNITED STATES DISTRICT COURT**  
26 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

27 **IN THE MATTER OF THE**  
28 **SEIZURE OF:**

No. 18-CV-06742-RGK (PJW)

29 ANY AND ALL FUNDS HELD IN  
30 REPUBLIC BANK OF ARIZONA  
31 ACCOUNT[S] XXXX1889, XXXX2592,  
32 XXXX1938, XXXX2912, AND,  
33 XXXX2500.

**Legal Authority for Opposition to  
Seizure Warrants and Basis for Relief**

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1 Movant/Claimant James Larkin hereby responds to this Court's Order (Doc.  
2 102) to explain the legal authority and legal basis for relief in support of the Motion to  
3 Vacate or Modify Seizure Warrants ("Motion") (Doc. 6).

#### 4 **Background**

5 The Motion presented four separate grounds for vacating or modifying the  
6 seizure warrants: (1) the First and Fourth Amendments bar pre-conviction seizures of  
7 publishing assets or proceeds and a probable cause showing cannot support such  
8 seizures (Mot. 13-18); (2) even if such seizures could be effected, the First and Fourth  
9 Amendments required a prompt adversarial hearing in which the Government had to  
10 meet a heightened standard of proof beyond probable cause (Mot. 18-21, 29-36);  
11 (3) entirely apart from First Amendment concerns, the warrants in this case were  
12 obtained through knowing or recklessly false statements and material omissions in  
13 violation of the Fourth Amendment (Mot. 21-29); and (4) the seizures are markedly  
14 over-inclusive because, among other things, the Government failed to trace seized  
15 assets to specific alleged criminal activity (Mot. 36-41). The Government never  
16 responded to the merits of Claimants' Motion. After several procedural maneuvers, it  
17 filed an *ex parte* application to stay all proceedings pursuant to 18 U.S.C. § 981(g) on  
18 the claim that a hearing on the Motion could "be considered to function as a request  
19 for discovery" that would adversely affect the prosecution of the related criminal case.  
20 This Court granted the Government's motion. (Doc. 85.)

21 Claimants appealed. Rather than file an opposition to Claimants' opening brief,  
22 the Government filed a Motion for Limited Remand and to Amend Briefing Schedule  
23 in which it said it now "agrees appellants are entitled to a determination of whether  
24 any First Amendment interest entitles them to a pretrial hearing to challenge the  
25 seizures." (App. Doc. 49-1 at 12-13.) The Ninth Circuit nevertheless ordered the  
26 Government to file its opposition brief, in which the prosecutors renewed the call for  
27 a "partial remand," which should be limited to "appellants' challenge to the sufficiency  
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1 of the warrants, including whether they are entitled to a *Franks* hearing.” (App. Doc.  
 2 59 at 39-40.) The Court vacated the stay order and remanded, noting Claimants’  
 3 argument that it had been issued without first addressing “the constitutional challenges  
 4 to the pretrial seizures,” and concluding that “both parties agree that Appellants’  
 5 motion should have been adjudicated prior to issuance of the stay.” (App. Doc. 78 at  
 6 3.) At the same time, the Ninth Circuit denied the Government’s motion for a “limited  
 7 remand.” (App. Doc. 77.)

## 8 **Legal Authority for Opposition to Seizure Warrants and Basis for Relief**

### 9 **1. The First Amendment Bars Pretrial Seizure of Publishing Proceeds**

10 The *ex parte* seizures of Claimants’ bank accounts and assets were based on the  
 11 Government’s claim that it established probable cause to find their publishing activities  
 12 were illegal and that it could therefore seize any proceeds derived from those activities.  
 13 Mot. 5-12. However, the First Amendment prohibits pretrial *ex parte* seizures of  
 14 publishing assets and proceeds based on nothing more than a showing of probable  
 15 cause that the assets are linked to criminal activity. This is because the Government  
 16 always has the burden to prove speech is unprotected by the First Amendment *before*  
 17 it may impose burdens, even if only financial ones. See *United States v. Playboy Entm’t*  
 18 *Grp., Inc.*, 529 U.S. 803, 812, 816 (2000).

19 In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 51 (1989), the Supreme Court  
 20 invalidated a section of the Indiana RICO law that authorized the pretrial seizure of  
 21 assets “subject to forfeiture” upon a showing of probable cause. The Government  
 22 had obtained a forfeiture order and seized the real estate, publications, and other  
 23 personal property of the defendants, padlocking three adult bookstores and hauling  
 24 away their contents. *Id.* at 52. Although the materials at issue could be forfeitable *upon*  
 25 *conviction*, the Court held “the seizure at issue here [is] unconstitutional.” *Id.* at 65-66.  
 26 The Ninth Circuit applied *Fort Wayne Books* to invalidate pretrial forfeiture provisions  
 27 of the federal RICO statute in *Adult Video Ass’n v. Reno*, 41 F.3d 503 (9th Cir. 1994)  
 28

(re-adopting holding invalidating pretrial forfeitures as set forth in *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992), *vacated*, *Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993)). Both courts held that “[t]he First Amendment will not tolerate such seizures” based on mere probable cause. *Barr*, 960 F.2d at 788; *Fort Wayne Books*, 489 U.S. at 65-66.

Caselaw makes clear that the same First Amendment principles prohibit the seizure of non-expressive materials and publishing proceeds. *Fort Wayne Books* and *Adult Video Ass'n* dealt with the seizure of books and other expressive materials and did not rule on seizures of non-expressive materials because provisions relating to non-expressive materials were not challenged. *Fort Wayne Books*, 489 U.S. at 67 n.12; *Adult Video Ass'n v. Barr*, 960 F.2d at 788 n.6 (“Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality.”). But subsequent cases clarify that the same First Amendment principles applied in *Fort Wayne Books* and *Adult Video Ass'n*. prohibit the pretrial seizure of non-expressive materials and publishing proceeds. *Citizens United v. FEC*, 558 U.S. 310, 336-37 (2010) (laws may infringe speech “by impounding proceeds on receipts or royalties”) (citations omitted); see *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 484 n.19 (D.D.C. 1989) (“[P]re-trial seizure of non-expressive material [including printing presses, bank accounts, etc.] *ex parte* from a business engaged in distributing expressive material also is unconstitutional.”), *rev'd on standing grounds sub nom. American Library Ass'n v. Barr*, 956 F.2d 1178, 1194-96 (D.C. Cir. 1992).

Relatedly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), the Supreme Court found that the Government cannot “freeze” profits from the sale of a book under a statutory scheme that authorized forfeiture of proceeds of crime and prejudgment attachment procedures to ensure that wrongdoers “do not dissipate their assets.” *Id.* at 111. The Court assumed that the income escrowed by the law “represent[ed] the fruits of crime” but nevertheless held that encumbering the proceeds was “presumptively inconsistent with the First



1 Amendment” as it “imposes a financial burden on speakers because of the content of  
2 their speech.” *Id.* at 115, 119.

3 In briefing to the Ninth Circuit, the Government admitted that pretrial seizures  
4 of both expressive and non-expressive materials from “an *active ongoing* publishing  
5 business” are barred by the First Amendment. (App. Doc. 59 at 42, 57-58.) It then  
6 tried to argue that seizing money earned from speech activities is somehow different,  
7 but provided no legal authority supporting the proposition that publishing proceeds  
8 may be seized pretrial without an adversary hearing. The Government merely  
9 attempted to distinguish *Simon & Schuster* by noting it involved a facial challenge to an  
10 overly broad statute. (*Id.* at 59-61.)

11 This analysis confuses First Amendment *injury* (imposing a financial burden on  
12 past speech prior to adjudication of its protected or unprotected status) with the  
13 *mechanism* used to inflict the injury (*i.e.*, whether by an unconstitutionally overbroad law  
14 or the unconstitutional application of a seizure law). The Supreme Court has explained  
15 that Government actions may operate to inflict First Amendment injury in many  
16 different ways and “at different points in the speech process.” *Citizens United*, 558 U.S.  
17 at 336-37 (*e.g.*, imposing permit requirements, impounding proceeds, exacting a cost  
18 after the speech occurs, or pursuing criminal penalties). *Simon & Schuster* may have  
19 involved a different *mechanism*, but the constitutional *injury* there was the same as in this  
20 case.

21 Here, there is no question about First Amendment injury – proceeds of  
22 publishing were seized prior to a final adjudication of legality. The Government’s use  
23 of pretrial seizures in this case incorrectly assumes a probable cause showing can  
24 substitute for the points it must ultimately prove – that the ads at issue were for  
25 criminal activity *and*, if they were, that the Claimants are criminally liable for their  
26 publication. In short, the Government’s argument assumes its conclusion. This,  
27 however, is improper because the classified ads on Backpage.com are presumed to be  
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1 constitutionally protected until the Government proves otherwise at trial. *Ashcroft v.*  
2 *Free Speech Coal.*, 535 U.S. 234, 255 (2002) (“Protected speech does not become  
3 unprotected merely because it resembles the latter. The Constitution requires the  
4 reverse.”). Publication of ads for adult services and escorts is legal in all 50 states and  
5 is constitutionally protected. *Backpage.com v. McKenna*, 881 F. Supp. 2d 1262, 1282  
6 (W.D. Wash. 2012) (escort ads have long been permitted and escort services are  
7 licensed and regulated in many states); *People v. Ferrer*, 2016 WL 7237305 \*10 (Sup. Ct.  
8 Sacramento Cty. Dec. 9, 2016) (“Providing a forum for online publishing is a  
9 recognized legal purpose” and “charg[ing] money for the placement of advertisements  
10 ... qualif[ies] as services rendered for legal purposes.”); *Backpage.com, LLC v. Dart*, 807  
11 F.3d 229, 234 (7th Cir. 2015) (“[N]ot all advertisements for sex are advertisements for  
12 illegal sex.”); *Doe v. Backpage.com LLC*, 104 F. Supp. 3d 149, 156-57 (D. Mass. 2015)  
13 (“The existence of an escorts section in a classified ad service, whatever its social  
14 merits, is not illegal.”), *aff’d*, 817 F.3d 12 (1st Cir. 2016).

15 **Implications for this proceeding:** All of the seizures at issue are based on  
16 nothing more than a showing of probable cause and therefore are constitutionally  
17 infirm under the applicable First Amendment standard. Once the correct standard is  
18 articulated and applied, there is no need for discovery or further proceedings. This  
19 Court should immediately vacate the seizures and order the Government to return all  
20 Claimants’ assets without delay.

21 **2. If a Hearing is to be Held, Heightened First and Fourth**  
22 **Amendment Standards Apply**

23 Where publishing proceeds are involved, the Government is barred from  
24 conducting a pre-conviction seizure. However, if the Court were to convene a hearing  
25 on the pre-conviction seizures’ validity, certain First and Fourth Amendment  
26 principles must govern further proceedings. Mot. 18-20, 29-36. Where materials or  
27 proceeds are even arguably protected by the First Amendment, the Government is  
28

1 required to employ “procedural safeguards designed to obviate the dangers of a  
2 censorship system.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60  
3 (1975) (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)); *see also Blount v. Rizzi*,  
4 400 U.S. 410, 416 (1971). Such procedures include the right to an adversary hearing  
5 in which a final judicial determination on the merits can be provided within a brief,  
6 specified time. *Id.* at 417; *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-  
7 74 (1971); *see* Mot. at 18-19.

8 Certain legal requirements govern any such hearing that implicates First  
9 Amendment concerns: **(1) The Government must bear the burden of proof,**  
10 **which cannot be satisfied by a showing of probable cause.** *Playboy Entm’t Grp.*,  
11 529 U.S. at 818; *Fort Wayne Books*, 489 U.S. at 63; *Blount*, 400 U.S. at 418-20; *see* Mot.  
12 30. **(2) The Government must link any seized assets to specific illegal ads**  
13 **known to Defendants and for which they had the specific intent to further**  
14 **the illegal activity related to those ads.** *Smith v. California*, 361 U.S. 147, 153-54  
15 (1959); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015); *Woodhull Freedom Found.*  
16 *v. United States*, 334 F. Supp. 3d 185, 199-201 (D.D.C. 2018), *appeal docketed*, No. 18-  
17 5298 (D.C. Cir. Oct. 12, 2018); *see* Mot. 30-34. **(3) Seizures cannot be based on**  
18 **the judgment of a law enforcement officer that speech appears to be**  
19 **constitutionally unprotected.** *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637  
20 (1968); *Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Roaden v. Kentucky*, 413  
21 U.S. 496, 506 (1973); *Stanford v. Texas*, 379 U.S. 476, 485(1965) (“leaving the  
22 protection of [First and Fourth Amendment] freedoms to the whim of the officers  
23 charged with executing the warrant” is a “constitutional impossibility”); *see* Mot. 34-  
24 36.

25 **Implications for this proceeding:** The Government followed none of the  
26 constitutionally-required procedures regarding seizure of materials or proceeds that  
27 implicate First Amendment interests. It obtained seizure warrants based on nothing  
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1 more than a showing of probable cause, failed to initiate judicial proceedings to rule  
2 on the seizures' validity, made no attempt to obtain a ruling within a reasonable period,  
3 and established no process for obtaining a final judicial ruling on its claim that  
4 publishing-related assets and proceeds are forfeitable. It merely assumed that which it  
5 must prove at an adversarial hearing. Given these failings, the seizures should be  
6 vacated; the assets should be returned; and, if the Government chooses still to pursue  
7 seizures, it would have to initiate new proceedings under the standards set forth above.

8 **3. The Government's Probable Cause Showing Was Defective Under**  
9 ***Franks v. Delaware*.**

10 Entirely apart from the First Amendment considerations, the seizure warrants  
11 in this matter were defective and should be vacated as a result. Claimants were entitled  
12 to a prompt hearing to challenge the sufficiency of warrants authorizing search or  
13 seizure. *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985). Any warrant  
14 obtained with an intentional or recklessly made false or misleading affidavit "must  
15 be voided and the fruits of the search excluded to the same extent as if probable  
16 cause were lacking." *United States v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997) (quoting  
17 *Franks v. Delaware*, 438 U.S. 154, 156 (1978)).

18 Under *Franks*, a criminal defendant has the right to challenge the veracity of  
19 statements made in support of a warrant application, and will prevail if he can show  
20 that the affiant officer intentionally or recklessly made false or misleading statements  
21 or omissions, and such statements were material to the probable cause finding. *United*  
22 *States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017). The officer who provides an  
23 affidavit supporting a warrant has "a duty to provide, in good faith, all relevant  
24 information to the magistrate." *Id.* The Fourth Amendment requires that a defendant  
25 be permitted to challenge a warrant affidavit that is "valid on its face when it contains  
26 deliberate or reckless omissions of facts that tend to mislead," because "[b]y reporting  
27 less than the total story, an affiant can manipulate the inferences a magistrate will  
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draw.” *United States v. Stanert*, 762 F.2d 775, 781, *amended*, 769 F.2d 1410 (9th Cir. 1985). At this stage, “[c]lear proof of deliberate or reckless omission is not required,” but only a showing that the officer intentionally or recklessly omitted facts “required to prevent technically true statements in the affidavit from being misleading.” *Id.*

The Motion set forth facts to show that the Government’s affidavits were deficient under a standard *Franks* analysis. Mot. at 20-29. The affidavits are rife with omissions and affirmative misstatements of the evidence that undermine any probable cause findings. In particular, the affidavits’ numerous misstatements of fact and omissions, including the failure to mention relevant judicial decisions involving Backpage.com are “precisely the kind of fact[s] ‘required to prevent technically true statements in the affidavit from being misleading.’” *United States v. Perkins*, 583 F. App’x 796 (9th Cir. 2014) (citation omitted); *Perkins*, 850 F.3d at 1117. On appeal, the Government altered its position, and now agrees that the Claimants “are entitled to a determination of whether they have made the substantial preliminary showing necessary to obtain a *Franks* hearing and, if so, to a *Franks* hearing itself,” although it requested that any such hearing be “limited.” (App. Doc. 59 at 37-40.) The Ninth Circuit denied the Government’s motion for a “partial remand.” (App. Doc. 77.)

In seeking more limited review, the Government erroneously conflated the First Amendment issues discussed above with the challenge to the warrant affidavits under *Franks*. It “agree[d] appellants are entitled to a determination of whether any First Amendment interest entitles them to a pretrial hearing to challenge the seizures,” but combined this with the *Franks* question. (App. Doc. 49-1 at 12-13). However, these issues are separate. As explained above, the First Amendment problems arising from pretrial seizure of publishing proceeds would exist even if the seizure affidavits were flawless and fully established probable cause. The issue under *Franks* is whether omissions and material misstatements in the affidavits undermine the probable cause showing. These deficiencies alone provide grounds for vacating the seizures even if

1 there were no First Amendment issues in the case.

2       **Implications for this proceeding:** No *Franks* hearing is required if the  
3 seizures are invalid on First Amendment grounds. As to Fourth Amendment issues,  
4 a hearing on the sufficiency of the seizure affidavits must focus on the “information  
5 and circumstances contained within the four corners of the underlying affidavit[s],”  
6 *Stanert*, 762 F.2d at 778, and is not an opportunity for the Government to attempt to  
7 bolster a deficient showing. If the Court conducts a “pre-*Franks* hearing,” Claimants  
8 should be given the opportunity to supplement and elaborate on the Motion. *United*  
9 *States v. McMurtrey*, 704 F.3d 502, 505 (7th Cir. 2013). Such review will relate, among  
10 other things, to Claimants’ pending Motion to Access and Use Purportedly  
11 Inadvertently Produced Materials (Doc. No. 69), currently set for hearing on  
12 November 12. (Doc. No. 101.) If there is a full *Franks* hearing and the Government  
13 seeks to explain or supplement its probable cause showing, Claimants must be  
14 permitted to cross-examine the agent who provided the affidavits and any other  
15 Government witnesses. *McMurtrey*, 704 F.3d 505-10.

16       **4. The Seizure Warrants Must be Vacated to the Extent the**  
17       **Government Has Not Traced Seized Assets to Specific Alleged**  
18       **Criminal Acts.**

19       If the Court does not vacate the seizures in their entirety for reasons set forth  
20 above, it should nonetheless vacate them to the extent the Government has failed to  
21 trace the proceeds it seized to specific alleged criminal acts. The Government seized  
22 Claimants’ bank accounts indiscriminately, accounts that included funds not derived  
23 from Backpage.com operations at all (including distributions from preexisting news-  
24 paper operations not connected to Backpage.com) and from operations not within the  
25 scope of the prosecution (including overseas operations, revenue from non-adult ad-  
26 vertising, and revenue from legal adult advertising that the Government does not, and  
27 cannot, allege was illegal, such as escort services). Mot. 36. Even if the Government  
28 could overcome First Amendment flaws, a hearing on these seizures would require the



Government to provide evidence tracing any assets seized to specific illegal advertisements for which it alleges Claimants are criminally culpable. Mot. 38-41.

The Government seized the entire balances of Claimants' bank and brokerage accounts on the theory that these accounts contain commingled funds, and untainted funds were purportedly used to "facilitate" the laundering of Backpage-related funds. However, this District has called into question the viability of the facilitation theory as a general matter. *See United States v. \$3,148,884.40 U.S. Currency*, 76 F. Supp. 2d 1063, 1067-68 (C.D. Cal. 1999). Moreover, under Section 18 U.S.C. § 981(a)(1)(A), "[t]o prove that property 'facilitated' money laundering, the Government must establish 'more than a mere showing that tainted and untainted funds were pooled together.'" *United States v. Approximately Six Hundred & Twenty Thousand Three Hundred & Forty-Nine Dollars & Eighty-Five Cents*, No. 13 CV 3966(RJD)(SMG), 2015 WL 3604044, at \*3 (E.D.N.Y. June 5, 2015) (citations omitted); *see United States v. Contents in Account No. 059-644190-69*, 253 F. Supp. 2d 789, 800 (D. Vt. 2003) (the mere "pooling [of] tainted and untainted funds" does not establish probable cause to seize accounts in their entirety) (citation omitted). "If 'facilitation' means nothing more than the commingling of funds in a complicated series of transactions, the tracing requirement would be a dead letter." *Id.*

**Implications for this proceeding:** If this Court does not vacate the seizures, it will be necessary to conduct an evidentiary proceeding requiring the Government to submit evidence tracing any seized assets to specific criminal acts. It will not be sufficient for the Government to assert that "tainted" and untainted funds have been commingled. At the hearing, the Government would have the burden of tracing seized funds to illegal activity and could only seize properly traced funds as follows:

Legal and Not Seizable	Seizable
Pre-Backpage Assets	Ads For Illegal Sex Intended to Promote Prostitution (Ads overtly soliciting money for sex for which specific intent is shown)
Newsprint Assets	
Rental Income Assets	
Backpage Non-Adult Revenue	
Backpage Legal Adult Revenue (Escort, etc.)	

DATED this 11th day of October, 2019.



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2019, I electronically transmitted a PDF version of this document to the Clerk of the Court, using the CM/ECF System, for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants listed below.

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